IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-cv-329-GKF(SAJ)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS "OBJECTION TO MAGISTRATE JUDGE JOYNER'S AUGUST 8, 2008 OPINION AND ORDER [DKT #1756]" [DKT #1757] AND REQUEST FOR ORAL ARGUMENT

Plaintiff, the State of Oklahoma ("the State"), respectfully submits this reply in further support of its objection to Magistrate Judge Joyner's August 8, 2008 Opinion and Order ("August 8, 2008 Order") which granted Defendants' request for extensions of the expert disclosure deadlines. In addition, as the State believes it would substantially aid the decisional process, the State requests oral argument on its Objection.

Argument

Despite having previously "admonished all parties that extensions of the scheduling order would be *rarely granted*, and only upon *unforeseeable good cause*," *see* DKT #1706 (May 15, 2008 Order) (emphasis added), Magistrate Judge Joyner's August 8, 2008 Order granted Defendants unilateral, unjustified and unfairly prejudicial extensions of time in which to disclose their non-damages experts. The State, therefore, quite appropriately objected. In their Response to the State's Objection, *see* DKT # 1758, Defendants nonetheless offer arguments that the August 8, 2008 Order is not clearly erroneous and contrary to law. Each of Defendants' arguments, however, is flawed and further underscores the fact that the State's Objection should be sustained.

First, Defendants incorrectly argue that the August 8, 2008 Order is justified by alleged delays in the production of certain of the State's materials. Response, pp. 4-6. Defendants' argument ignores the fact that to the extent there have been delays in productions, they have been quickly rectified when they have been brought to the State's attention.[1] Moreover, the fact that there may have been delays in certain isolated areas does nothing to change the fact that Defendants have received the overwhelming majority of materials to which they are entitled in a timely, organized and complete manner.[2] Finally, it should be noted that where there have been delays in the productions -- *e.g.*, when it was discovered that certain modeling information had been omitted from Dr. Engel's considered materials -- the State freely agreed to an extension of time for Defendants' corresponding expert equivalent in time to the delay in production. Defendants' exaggerated claims of prejudice due to isolated delays in the production of certain materials are just that -- exaggerations. They most certainly do not support the lengthy extensions granted in the August 8, 2008 Order, and to the extent the Order is based on this ground it is clearly erroneous and contrary to law.

Second, Defendants incorrectly argue that the August 8, 2008 Order is justified by the fact that the State is continuing to produce materials. Response, pp. 6-7. While it is true that the State is continuing to produce sampling and analysis data, this is simply because the State is continuing to do new sampling. Likewise, while it is true that the State is continuing to produce materials from the various State agencies, this is simply because the State's agencies have

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[1] The suggestion by Defendants that the State is improperly seeking to "withhold" information is without foundation and should not be credited.

[2] Defendants' Response, p. 6, makes mention of Magistrate Judge Joyner's Order regarding the disclosure of the State's sampling and analysis data to Defendants. Notably, this Order is presently on appeal to the District Court.

continued to perform their statutory missions since the last productions were made and new materials have consequently been generated by those agencies.[3] It makes absolutely no sense to base the lengthy extensions in the August 8, 2008 Order on the fact that the State is, as required by the Rules and this Court's orders, simply supplementing productions with new materials as they are generated. To the extent the Order is based on this ground it is clearly erroneous and contrary to law.

Third, Defendants incorrectly argue that the August 8, 2008 Order is justified by the number and size of the State's expert reports, as well as the need to depose a large number of expert and fact witnesses. Response, pp. 7-9. The central -- and wholly flawed -- premise of this argument is that Defendants were not able to begin their expert witness and case preparations until after the State disclosed its expert witnesses. The fact of the matter is that nothing precluded Defendants from actively and aggressively preparing their defenses these past three years. Defendants' failure to plan most certainly does not support the lengthy extensions granted in the August 8, 2008 Order. To the extent the Order is based on this ground it is clearly erroneous and contrary to law.

Fourth, Defendants incorrectly argue that the August 8, 2008 Order is consistent with a principle of balance between the amount of time granted to each side's experts. Response, pp. 9-11. This argument by Defendants is merely a variation upon their third argument above -- namely that the extensions in the August 8, 2008 Order are justified by the fact that the original

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[3] Defendants' assertion that "[i]f Plaintiffs [sic] are allowed to continue sending new data to Defendants' experts, the defense experts' work will never be done" is thus specious. How, if at all, these data and materials might ultimately be used in this case are presently unknown. They might, for example, be used in cross-examination of Defendants' experts or as the basis for rebuttal or supplemental expert reports. They have not, however, been used in the errata corrections provided by the State's experts. Thus, Defendants' argument that they are dealing with a "moving target" with respect to the State's experts' reliance materials is incorrect.

spacing between the expert disclosures was purportedly unworkable from the get-go.[4] Again, the central (and erroneous) premise of this flawed argument is that Defendants' experts were unable to begin the vast majority of their expert work until they received the State's expert reports and materials. Response, pp. 9-11. They obviously were not, and to the extent the Order is based on this ground it is clearly erroneous and contrary to law.

Fifth and finally, Defendants incorrectly argue that the August 8, 2008 Order does not unfairly prejudice the State. Response, pp. 11-12. Here again Defendants repeat the flawed premise that Defendants' experts have been afforded a "mere fraction" of the time afforded the State's experts. The fact of the matter is that under the Amended Scheduling Order, Defendants' experts were afforded *three months more* than the State's experts to do their work. Under the August 8, 2008 Order, Defendants' experts now have *five to twelve months more* than the State's experts to do their work. Every additional month that Defendants' experts have to do their work is one fewer month that the State has to prepare its replies to Defendants' experts and otherwise prepare its case. Thus, the entire onus of the extensions provided for in the August 8, 2008

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[4] This argument, as explained in the State's opposition papers, *see* DKT #1736, is essentially a motion to reconsider the Amended Scheduling Order. As explained in those papers, such a motion is, under the applicable Rules, untimely. The original Scheduling Order provided for a two-month spacing between the disclosure of the State's non-damages experts and Defendants' non-damages experts. Defendants did not move for reconsideration of or file objections to the original Scheduling Order. Nonetheless, Defendants, in September 2007, moved to modify that Scheduling Order and sought a one-year spacing between these disclosures. The State, on the other hand, sought to maintain the existing spacing between these disclosures. On November 15, 2007, the Court, after extensive briefing and oral argument, considered and rejected Defendants' arguments for a one-year spacing, and instead adopted a three-month spacing between these disclosures. *See* Amended Scheduling Order, DKT #1376. Again, Defendants neither moved for reconsideration under Rule 59(e) nor filed an objection under Rule 72(a) to the Amended Scheduling Order within 10 days. *See* Fed. R. Civ. P. 59(e) (requiring motions to alter or amend be filed within 10 days); Fed. R. Civ. P. 72(a) (requiring objections be filed within 10 days). Defendants therefore waived any purported argument that the spacing between the respective disclosures of non-damages experts is somehow prejudicial, and were precluded from seeking to modify the fundamental structure of the Amended Scheduling Order to provide for lengthier spacing between the parties' expert disclosures.

Order falls on the State. This is unfairly prejudicial to the State, and the August 8, 2008 Order is thus clearly erroneous and contrary to law.

* * *

The State is well-aware that objections to a Magistrate Judge's order should not be lightly made. The fact of the matter, however, is that the extensions provided for in the August 8, 2008 Order not only are not supported by the record, but also severely and unfairly prejudice the State. Simply put, Defendants did not satisfy the "demanding" standard for an extension, *see* DKT #1652, and thus for the Magistrate Judge to find good cause for such an extension was clearly erroneous and contrary to law.

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